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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	Case No: 2:08-cr-27-GMN-GWF
)	
v.)	Motion to Dismiss Defendant's "Motion for
)	Affirmative Relief, and Motion to Compel
GREGORY HOFFMAN,)	Court for Opinion," CR 146.
)	
Defendant.)	
)	
)	

The United States Of America, by and through Daniel G. Bogden, United States Attorney, and Adam M. Flake, Assistant United States Attorney, files this motion to dismiss Defendant Gregory Hoffman's "Motion for Affirmative Relief, and Motion to Compel Court for Opinion," CR 146. This response is timely filed pursuant to the Court's minute order of March 6, 2014, giving the Government until March 23, 2014 to respond.

ARGUMENT

This Court Should Dismiss Hoffman’s Motion Because It Is a Successive 28 U.S.C. § 2255 Petition, Filed Without the Ninth Circuit’s Permission.

Regardless how a defendant styles motion, the Court should treat it as a successive § 2255 petition if it raises claims that a defendant could have sought under that section. *See, e.g., United States v. Buenrostro*, 638 F.3d 720, 722 (9th Cir. 2011) (treating Rule 60(b) motion as successive § 2255 petition because it raised a claim of ineffective assistance of counsel).

Before filing a successive § 2255 petition, a defendant is required to seek authorization from the Court of Appeals. *See* 28 U.S.C. §§ 2244, 2255; *see also United States v. Lopez*, 577 F.3d 1053, 1061 (9th Cir. 2009) (“[A] petitioner must move for authorization from [the Court of Appeals] to file a “second or successive” § 2255 motion in the district court . . .”).

On July 24, 2012, Hoffman filed an amended § 2255 petition. CR 127. The Court denied it on November 6, 2013. CR 135. Hoffman sought a certificate of appealability, which this Court denied on December 27, 2013, and which the Ninth Circuit denied on February 21, 2014. CR 145.

Hoffman has now filed what he styles as a “Motion for Affirmative Relief, and Motion to Compel Court for Opinion,” CR 145. In fact, Hoffman’s motion is a successive § 2255 petition because it raises claims that could have been raised under that section. Specifically, Hoffman challenges the length of his sentence, the manner in which that sentence was determined, the validity of the Sentencing Guideline under which he was sentenced, and the effectiveness of his counsel. *See* CR 146. All of these arguments constitute claims that “the sentence was imposed in violation of the Constitution or laws of the United States . . . or is otherwise subject to collateral attack . . .” 28 U.S.C. § 2255. As Hoffman has not obtained the Ninth Circuit’s permission to file a successive § 2255 petition, this Court should dismiss it.

CONCLUSION

For the foregoing reasons, this Court should dismiss Hoffman's motion without addressing it on the merits. In the event that the Court declines to do so, the Government requests an opportunity to respond to substance of Hoffman's motion.

Dated this 14th day of March 2014.

Respectfully submitted,

DANIEL G. BOGDEN
United States Attorney

/s/ Adam Flake
ADAM M. FLAKE
Assistant United States Attorneys

CERTIFICATE OF SERVICE

UNITED STATES OF AMERICA,)
)
Plaintiff,) 2:10-CR-00118-LRH
)
vs.)
)
GREGORY HOFFMAN,)
)
Defendant.)

CERTIFICATE OF SERVICE

I hereby certify that on March 14, 2014, I electronically filed the foregoing Government's Motion to Dismiss Defendant's "Motion for Affirmative Relief, and Motion to Compel Court for Opinion," CR 146 with the Clerk of the Court for the United States District Court by using the CM/ECF system.

A copy of same was also sent via United States Postal Service to:

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P.O. Box 1000
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PRO SE

/s/
Ellenrose Jarmolowich
Legal Assistant